

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN A. GEARHART,
Petitioner,
v.
JOSIE GASTELO,
Respondent.

Case No. [18-cv-06017-WHO](#) (PR)

**ORDER REOPENING ACTION;
ORDER DISMISSING PETITION
WITH LEAVE TO AMEND**

This federal habeas action was stayed at petitioner Gearhart's request so that he could exhaust claims in state court. (Dkt. No. 18.) Gearhart now moves to reopen and has filed a first amended petition. (Dkt. No. 20.) Accordingly, the stay is DISSOLVED and the action is REOPENED. The Clerk shall modify the docket to reflect this.

The first amended petition cannot proceed as is. It states without elaboration what claims he wants to pursue and it does not appear on this Court's form. A federal habeas petition must state claims for relief and provide specific facts in support of each claim. Accordingly, the first amended petition is DISMISSED with leave to file an amended petition on this Court's form on or before **November 16, 2020**. The amended petition must include the caption and civil case number used in this order (18-06017 WHO (PR)) and the words SECOND AMENDED PETITION on the first page. Because an amended petition completely replaces the previous petitions, Gearhart must include in his second amended petition all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from a prior petition by reference. Failure to file an amended petition on this Court's form by November 16, 2020 will result in the dismissal of this action under Federal Rule of Civil Procedure 41(b) for

1 failure to prosecute.

2 The Clerk shall amend the docket to reflect that Josie Gastelo, the warden of the
3 prison in which petitioner is housed, is the sole respondent in this action. Petitioner also
4 named Rosemary Ndoh as a respondent in addition to Gastelo. Gastelo, not Ndoh, is the
5 sole proper respondent here, as she is the custodian having day-to-day control over
6 petitioner, the only person who can produce “the body” of the petitioner. *Brittingham v.*
7 *United States*, 982 F.2d 378, 379 (9th Cir. 1992) (quoting *Guerra v. Meese*, 786 F.2d 414,
8 416 (D.C. Cir. 1986)). The Clerk shall terminate Ndoh as a respondent.

9 **IT IS SO ORDERED.**

10 **Dated:** September 30, 2020



WILLIAM H. ORRICK

United States District Judge

United States District Court
Northern District of California